

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$86,254.00, for which he was not at fault, for the period September 22, 2016 through January 6, 2018 as he received schedule award compensation to which he was not entitled; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On October 24, 2012 appellant, then a 58-year-old construction representative, filed a traumatic injury claim alleging that on October 22, 2012 he experienced pain in his low back and right leg when he slipped on a hole in the sidewalk while in the performance of duty. He stopped work on October 24, 2012. OWCP accepted the claim, which had been assigned OWCP File No. xxxxxx475, for lumbosacral radiculitis on the right side. It subsequently expanded acceptance of the claim to include a right shoulder sprain and right rotator cuff tear.

OWCP previously had accepted that appellant sustained a lumbosacral strain and internal derangement of the right knee due to a June 1, 1995 employment injury, assigned File No. xxxxxx701. It also had accepted that he sustained neck and shoulder sprains, a tear of the right medial meniscus, a right knee sprain, and a left knee contusion due to a May 8, 1997 employment injury, assigned File No. xxxxxx543. OWCP combined File No. xxxxxx701 into Master File No. xxxxxx543. Under File No. xxxxxx701, by decision dated February 13, 2004, OWCP granted appellant a schedule award for 37 percent permanent impairment of the right lower extremity, based upon his total right knee replacement.<sup>3</sup>

By decision dated June 25, 2015, OWCP terminated appellant's entitlement to wage-loss compensation effective that date as he had no further disability causally related to his October 22, 2012 employment injury.<sup>4</sup>

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<sup>3</sup> By decision dated February 7, 2003, the Board affirmed in part January 31 and May 16, 2002 OWCP decisions issued under File No. xxxxxx701 finding that appellant had no permanent impairment of the left lower extremity, but set aside the decisions regarding the extent of permanent impairment of the right lower extremity. Docket No. 02-2065 (issued February 7, 2003). The Board found that OWCP had properly determined the extent of his right lower extremity impairment due to his knee condition, but that a conflict in medical opinion existed regarding the extent of any permanent impairment of the right lower extremity originating from his back condition. By decision dated June 23, 2003, OWCP granted appellant a schedule award for an additional eight percent permanent impairment of the right lower extremity, for a total right lower extremity impairment of 37 percent, due to his total right knee replacement. By decision dated December 15, 2003, an OWCP hearing representative vacated the June 23, 2003 decision and remanded the case for further development of the medical evidence. In decisions dated February 13, 2004 and February 1, 2005, OWCP found that appellant had no more than 37 percent permanent impairment of the right lower extremity for which he received schedule award compensation. By decision dated April 6, 2015, it denied his request for reconsideration of the merits under 5 U.S.C. § 8128(a).

<sup>4</sup> By decision dated April 5, 2016, OWCP granted appellant a schedule award for 15 percent permanent impairment of the right upper extremity. It noted that he had 12 percent permanent impairment of the right upper extremity under the current claim and 3 percent permanent impairment under OWCP File No. xxxxxx441, for a total permanent impairment of 15 percent. The period of the award ran for 46.8 weeks from August 19, 2015 to July 11, 2016.

On April 25, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a report dated September 22, 2016, Dr. Samy F. Bishai, an orthopedic surgeon, opined that appellant had 24 percent permanent impairment of the right upper extremity due to a loss of range of motion of the shoulder and 24 percent permanent impairment of the right lower extremity due to radiculopathy at the L5 and S1 nerve root under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

On January 19, 2017 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted that appellant was status post a lumbar interbody fusion at L4-5, a decompressive laminectomy at L3 through L5, and lumbar interbody fusion at L3 through S1. For the right lower extremity, he applied the provisions of *The Guides Newsletter*, Rating Spinal Nerve Impairment Using the Sixth Edition (July/August 2009), to find that appellant had 16 percent permanent impairment due to pain and motor weakness from L5 radiculopathy on the right, and 10 percent permanent impairment due to pain and motor weakness from S1 radiculopathy, for a total right lower extremity impairment of 24 percent due to lumbar radiculopathy after utilizing the Combined Values Chart.

By decision dated February 27, 2017, OWCP granted appellant a schedule award for 24 percent permanent impairment of the right lower extremity. The period of the award ran for 69.12 weeks from September 22, 2016 to January 18, 2018 at a weekly compensation rate of \$1,262.50.

On November 5, 2018 appellant filed a Form CA-7 claim for an increased schedule award. He submitted an October 11, 2018 impairment evaluation from Dr. Mark A. Seldes, Board-certified in family practice, in support of his request. Dr. Seldes found that appellant had an additional 28 percent permanent impairment of the right upper extremity.

On February 21, 2019 Dr. David I. Krohn, a Board-certified internist serving as a DMA, reviewed Dr. Seldes' report and advised that appellant had no more than the previously awarded 24 percent permanent impairment of the right lower extremity. He further found no additional right upper extremity impairment.<sup>6</sup>

In a July 11, 2019 memorandum, OWCP noted that appellant had received multiple schedule awards for the right upper and lower extremities under different OWCP file numbers. It noted that he had received a schedule award for 24 percent of the right lower extremity under File No. xxxxxx475 and 37 percent permanent impairment of the right lower extremity under File No. xxxxxx701. OWCP found that it had erred in paying appellant 24 percent permanent impairment of the right lower extremity impairment under File No. xxxxxx475 as he had previously received

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<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> In a supplemental report dated March 12, 2019, Dr. Seldes again found an additional 28 percent permanent impairment of the right upper extremity, for a total impairment of 43 percent. On June 28, 2019 Dr. Krohn found 32 percent permanent impairment of the right upper extremity.

a schedule award for 37 percent permanent impairment of the right lower extremity under File No. xxxxxx701.<sup>7</sup>

On July 11, 2019 OWCP informed appellant of its preliminary determination that he had received an \$86,254.00 overpayment of schedule award compensation for the period September 22, 2016 to January 6, 2018. It found that it had previously paid him a schedule award for 37 percent permanent impairment of the right lower extremity under OWCP File No. xxxxxx701 and thus had erred in paying him an additional schedule award for 24 percent permanent impairment of the right lower extremity under OWCP File No. xxxxxx475. OWCP further advised appellant of its preliminary finding that he was without fault in the creation of the overpayment of schedule award compensation. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. No response was received by OWCP.

By decision dated August 14, 2019, OWCP found that appellant had received an overpayment of schedule award compensation in the amount of \$86,254.00 for the period September 22, 2016 to January 6, 2018. It determined that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, noting that he had not responded to its preliminary overpayment determination. OWCP found that appellant should forward payment for the entire amount to repay the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>8</sup> Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>9</sup>

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment may be created.<sup>10</sup> OWCP's procedures provide that claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.<sup>11</sup> If a claimant requests an increased schedule award due to a belief that his or her medical condition has deteriorated since the original award has been issued,

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<sup>7</sup> OWCP advised that File No. xxxxxx543 was a subsidiary of File No. xxxxxx701; however, File No. xxxxxx701 is a subsidiary of File No. xxxxxx543.

<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> *Id.* at § 8129(a).

<sup>10</sup> *R.S.*, Docket No. 20-0311 (issued July 8, 2020); *J.C.*, Docket No. 09-1526 (issued June 1, 2010).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(e) (February 2013).

and additional development is undertaken to address this claim for an increased schedule award, a new schedule award decision should be issued that addresses and substantiates the newly determined impairment rating. If a lesser degree of impairment than previously awarded is substantiated, an overpayment thereafter is appropriate.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP improperly determined that appellant had received an overpayment of compensation in the amount of \$86,254.00 for the period September 22, 2016 to January 6, 2018, as it failed to resolve the issue of the extent of his right lower extremity impairment. OWCP paid appellant a schedule award for 37 percent permanent impairment of the right lower extremity under File No. xxxxxx701, a subsidiary of Master File No. xxxxxx543, based upon his right knee condition. Under these file numbers OWCP accepted lumbosacral strain, internal derangement of the right knee, a neck and shoulder sprain, a tear of the right medial meniscus, right knee sprain, and a left knee contusion.

Appellant subsequently requested a schedule award under OWCP File No. xxxxxx745, accepted for right lumbosacral radiculitis, right shoulder sprain, and a right rotator cuff tear. In a report dated September 22, 2016, Dr. Bishai opined that appellant had 24 percent permanent impairment of the right lower extremity due to radiculopathy at the L5 and S1 nerve root. Dr. Harris, a DMA, applied the provisions of *The Guides Newsletter* and concurred with his finding of 24 percent permanent impairment of the right lower extremity.

By decision dated February 27, 2017, OWCP paid appellant a schedule award for 24 percent permanent impairment under OWCP File No. xxxxxx475.

OWCP thereafter determined that appellant was not entitled to the schedule award for 24 percent permanent impairment issued under File No. xxxxxx745 as he had previously received a right lower extremity award for a greater percentage of impairment. It thus found that the entire amount of the schedule award that he had received for the 24 percent permanent impairment under File No. xxxxxx475 constituted an overpayment of schedule award compensation.

The Board finds that OWCP had not adequately supported its determination that appellant received an \$86,254.00 overpayment of compensation. OWCP failed to consider that the right lower extremity ratings were not based on the same accepted conditions. It failed to request that a DMA compare the prior award and the current award to determine whether it was based on the same accepted conditions. Before the amount of overpayment can be determined, the evidence must clearly establish the degree of permanent impairment.<sup>13</sup>

The Board has previously held that simply comparing the prior percentage of permanent impairment awarded to the current impairment for the same member is not always sufficient to deny an increased schedule award claim.<sup>14</sup> The issue is not whether the current permanent

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<sup>12</sup> *Id.*

<sup>13</sup> *Supra* note 10 at Chapter 2.808.9(e) (February 2013).

<sup>14</sup> *See P.M.*, Docket No. 18-1215 (issued June 18, 2020).

impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.<sup>15</sup>

As the schedule award issue has not been properly considered, the Board finds that the overpayment issues cannot be addressed.<sup>16</sup> Therefore, the August 14, 2019 decision is reversed.<sup>17</sup>

### **CONCLUSION**

The Board finds that OWCP has not established fact of overpayment.<sup>18</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 9, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> *Id.*; *Richard Saldibar*, 51 ECAB 585 (2000).

<sup>16</sup> *Id.*

<sup>17</sup> Upon return of the case file, OWCP should consider administratively combining the present claim file with Master File No. xxxxxx543 and its subsidiary File No. xxxxxx701.

<sup>18</sup> In light of the Board's disposition of the first issue, the issue of waiver of recovery is moot.